Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

TORE B. NORDAHL,

Petitioner,

vs.

STUDER REVOX AMERICA, INC.,
and STUDER REVOX AG,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Whether the Sixth Circuit erred in formulating the fourth element of the prima facie case in a national origin discrimination action to require that the terminated employee be replaced, and then ruling that a company president whose duties were given to two lower-ranking employees was as a matter of law not "replaced."

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Tore B. Nordahl, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The District Court Opinion and the Circuit Court Opinion are not reported. *See*, 78 F.3d 585 (Mem. unpub.). Both Opinions are appended.

JURISDICTION

The Circuit Court rendered its Opinion on March 5, 1996. App. 1. This is the judgment sought to be reviewed. Petitioner's Petition for Rehearing was denied on March 26, 1996. App. 34. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Equal Employment Opportunity Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), provides in part:

> "§ 2000e-2(a) **Employer Practices.** It shall be an unlawful employment practice for employer –

(i) to . . . discharge any individual . . . because of such individual's . . . national origin . . . "

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, on October 28, 1992, seeking remedies under Title VII.[1] The District Court had subject matter jurisdiction under 42 U.S.C. 2000e-(5)(f)(3). The District Court granted summary judgment to respondents on September 22, 1994. App. 16. Petitioner appealed to the United States Court of Appeals for the Sixth Circuit in apt time. That Court had subject matter jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF FACTS

Petitioner, a Norwegian national,[2] was hired in 1988 by Bruno Hochstrasser, the senior manager of respondent Studer Revox AG, a Swiss corporation, to manage Studer Revox America, Inc., a Delaware corporation, its United States subsidiary. Petitioner was initially employed as Vice President and General Manager, then became President in 1989. Studer Revox AG manufactures professional

[1] Petitioner also sought relief on common law claims. Certiorari is not sought on these claims.

[2] Petitioner became a naturalized United States citizen during the pendency of this case.

audio equipment. Petitioner was terminated as president of Studer Revox America, Inc. in October, 1991. Following his termination Hochstrasser became president of Studer Revox America, Inc. but did not perform any of the work previously done by petitioner. Petitioner's work was split between two existing employees of Studer Revox America, Inc., both of whom were Swiss nationals.

CIRCUIT COURT OPINION

The Circuit Court affirmed the grant of summary judgment against petitioner on the ground that he had not established the fourth element of the prima facie case applicable to national origin claims. It held that the fourth element of a national origin prima facie case could be established either by direct evidence of discriminatory intent or by showing four discrete elements adopted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[3] Specifically, the Court held that plaintiff had not shown the fourth element, that "he was replaced by a person outside the protected class," App. 6, because he had not shown that he was replaced at all since no one person took over all of his job duties.[4] Rather,

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[3] The Circuit Court opinion does not specifically mention *McDonnell Douglas*, but earlier cases which formulated the test that it uses cite to *McDonnell Douglas*. *See, e.g., Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir. 1992).

[4] Assuming that one is replaced, the requirement of showing that the replacement is outside the protected class is likely not good law after *O'Connor v. Consolidated Coin Caterers Corp.*, ___ U.S. ___, 116 S. Ct. 1307 (1996) (replacement by someone outside the protected class is not a proper element of

> [petitioner's] duties were simply redistributed to two existing employees directly below him in the management hierarchy who had already been performing related management work. It is well-established that "[s]preading the former duties of a terminated employee among the remaining employees does not constitute replacement." *Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992); *Barnes v. Gencorp., Inc.*, 896 F.2d 1457 (6th Cir.) *cert. denied*, 498 U.S. 878 (1990). Therefore as a matter of law, Nordahl was not replaced.

App. 7. The Circuit Court also held that the fourth element could be made out by a "showing that similarly situated non-protected employees were treated more favorably", App. 6-7, but then denied relief on this ground by reasoning that the two Swiss employees who took over petitioner's duties were not similarly situated because they did not have similar pay or job duties. App. 7-8.

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prima facie case in age discrimination action). *O'Connor* has subsequently been read to mean that replacement outside the protected class is not required to be shown for a prima facie Title VII race discrimination case. *Carson v. Bethlehem Steel Co.*, 82 F.3d 157 (7th Cir. 1996). This issue is not material here because both of petitioner's replacements were of Swiss national origin.

ARGUMENT

The Sixth Circuit erred in formulating the fourth element of the prima facie case in a national origin discrimination action to require that the terminated employee be replaced, and then ruling that a company president whose duties were given to two lower-ranking employees was as a matter of law not "replaced."

A plaintiff who is the top person in the company can make out a prima facie case in the Sixth Circuit only by direct evidence or by showing that a single person took all his job duties, even when one person alone succeeded to his title and its functions.[5] This rule cannot be squared with the purpose of the *McDonnell Douglas* prima facie case; it is in conflict with the rule in the First and Eleventh Circuits; and it provides an obvious strategy for evading Title VII.

1. The purpose of the prima facie case

Discrimination requires a showing of actual motivation, *Hazen Paper Co. v. Biggins*, 507 U.S. ___, 113 S. Ct. 1701 (1993), and thus is often difficult to prove. For that reason the Court initially created a presumption of discrimination in a racial refusal-to-hire case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and the lower courts have since proliferated presumptions in all other sorts of discrimination cases. The evidence sufficient for

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[5] This is the combined effect of the two methods of establishing the fourth element. "Spreading the duties" is not replacement, unless there is a similarly situated employee, *i.e.*, one of similar pay or job duties; but there will almost never be such a comparable person to the top person in the company.

the presumption need not directly show actual discriminatory motivation, but need show only "evidence adequate to create an inference that an employment decision was based on a discriminatory criterion." *Teamsters v. United States*, 431 U.S. 324, 358 (1977). This was done in *McDonnell Douglas* by requiring that the complainant demonstrate coverage by the statute and further show that the employer's action was not based on the "most common legitimate reasons" that would motivate an employer under the circumstances. *Teamsters v. United States*, 431 U.S. at 358 n.44. Thus the *McDonnell Douglas* prima facie case required a showing of racial minority membership and rejection of the job application (*i.e.*, statutory coverage), and that the applicant was qualified and that the job remained open after his rejection (*i.e.*, that the rejection was not based on either of the two most common legitimate reasons on which an employer might rely to reject a job applicant: "an absolute or relative lack of qualifications or the absence of a vacancy in the job sought", *Teamsters v. United States*, 431 U.S. at 358 n.44). Additional "most common legitimate reasons" in the case here of termination of an employee might well be that the employer no longer needed the work done or that the employee was not doing the work satisfactorily. But, the fact that two Swiss take over the job duties of a discharged employee while another (Hochstrasser) takes over his title and official duties, does not show a "common legitimate reason" for terminating a qualified employee. The work is still there to be done. There is no "logical connection" between being replaced and being discriminated against. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1308 (1996). Employers do

not commonly terminate qualified employees who are performing satisfactorily. The Circuit Court has thus created a prima facie case paradigm that unduly prevents the employee from creating a presumption, and especially prevents the top person in the company, because this paradigm requires a showing that does not relate to a common reason for legitimate employer action.

2. Conflicts in the Circuits

In *Cumpiano v. Banco Santander Puerto Rico*, 908 F.2d 148, 154-55 (1st Cir. 1990), the Court held in a Title VII pregnancy discrimination case that the fourth element of the prima facie case requires only a showing that the employer continue to have a need to have the discharged employee's work done, by however many people.

> [W]hile the attributes of a successor employee may have evidentiary force in a particular case (citations omitted), a complainant can satisfy the fourth prong of a prima facie case simply by showing that, as here, the employer had a continued need for "someone to perform the same work after [the complainant] left." (citation omitted).

902 F.2d at 154. Likewise, in *Rollins v. Texsouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987), an age discrimination case, the Court held that a prima facie case is shown when the complainant's duties are taken over by other company employees. These cases are squarely in conflict with the decision below.

3. Strategies for Evasion

The *McDonnell Douglas* presumption is artfully general enough to allow most victims of discrimination to make a prima facie case. It gives a presumption of discrimination to every qualified minority who is denied an available job. The Circuit Court's formulation here, however, will allow employers to easily prevent qualified terminated persons from making a prima facie case. All the employer need do is assign some part of the duties of the discharged person to two employees for a reasonable time, if necessary hire another employee to take over the former duties of these two employees, and the prima facie case cannot be established despite that the work being performed and the number of employees performing it remains the same.

CONCLUSION

The Court should grant the Writ of Certiorari.

Respectfully submitted, this 21st day of June, 1996.

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Not Recommended For Full Text Publication

No. 94-6336

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TORE B. NORDAHL,

Plaintiff-Appellant,

v.

STUDER REVOX AMERICA, INC., a foreign corporation, STUDER CAPITAL CORPORATION, a Tennessee corporation, STUDER EDITECH CORPORATION, a foreign corporation, and STUDER REVOX AG, a foreign corporation,

Defendants-Appellees.

_____/

On Appeal from the United States District Court for the Middle District of Tennessee.

(Filed March 5, 1996)

BEFORE: MARTIN, GUY, and RYAN, Circuit Judges.

RYAN, Circuit Judge. The plaintiff, Tore Nordahl, filed suit alleging national-origin discrimination in violation of Title VII, 42 U.S.C. § 2000e, and various state-law claims arising out of the termination of his employment by the defendants, Studer Revox AG and its United States subsidiaries. The district court granted summary judgment as to all counts in favor of the defendants, and on appeal, the plaintiff argues that the district court erred in a variety of ways. We disagree, and will affirm.

I.

Studer Revox AG (SRAG), a Swiss manufacturer of professional audio equipment, hired Tore Nordahl to manage its three United States subsidiaries, Studer Revox America, Inc. (SRA), Studer Capital Corporation, and Studer Editech Corporation. Both SRA and Studer Capital are located in Nashville, Tennessee; Studer Editech is in California. Nordahl, a Norwegian national who became a naturalized United States citizen during the pendency of this case, had long been involved in the audio industry. Individuals at SRAG began soliciting him in 1988, and on October 7, 1988, he met with Bruno Hochstrasser in Regensdorf, Switzerland and signed an employment contract with SRA. Pursuant to the contract, Nordahl served as vice president general manager of SRA from October 1, 1988, and as president beginning April 1, 1989. He was based in Nashville for the entire period of his employment with SRA.

Nordahl drafted the contract following his negotiations with Hochstrasser, and according to Nordahl, the contract fully represented their agreement. The contract provided that Nordahl would be paid an annual salary of $96,000, along with commissions and various fringe benefits. His annual salary was increased from time to time, and by the end of his employment with SRA, his base salary was $145,000. Although Nordahl asserts that Hochstrasser and another principal of SRAG told him, a month and a half prior to execution of the contract, that they would "protect [his] career, [and would] not terminate [him] unless [they had] good reason," the contract only provided as follows with respect to termination:

> Both parties agree that this employment relationship is intended to be for the longer term. However, in the event one of the parties wishes to terminate the employment relationship, . . . [t]he agreement can be cancelled by notice in writing by either party with:
>
> – 90 days notice prior to March 31, 1989.
>
> – 180 days notice thereafter.

There is evidence in the record that at the time Nordahl entered into this employment contract, Studer Revox's position was being eclipsed by its competitors, due to its late entry into the digital audio technology market. In 1988, SRA lost approximately $1,000; in 1989, $31,000; and in 1990, $1 million. Between 1990 and 1992, SRA reduced its workforce from 45 to 27. As a consequence of its declining position, the Studer Revox organization was put on the market in 1989, and it was purchased in April 1990 by Motor Columbus AG, a Swiss holding company.

Nordahl was terminated as president of SRA on October 11, 1991. His termination letter informed him that he would be relieved of his duties immediately, but that his salary would be paid for the next six months. At the time of his termination, Nordahl was paid nearly twice as much as anyone else at SRA. The letter is ambiguous as to whether SRA's asserted reason for terminating Nordahl was that it blamed him for SRA's losses, or that it could no longer afford to pay a salary of his magnitude:

> [Y]ou are hereby notified that SRA desires to terminate your employment, effective 180 days from the date of this letter. . . .

> The reason for this termination is SRA's anticipated loss for this year, which we believe will exceed $1 million. This will be the poorest SRA performance in recent history.

Following Nordahl's termination, Hochstrasser became president of SRA. Nordahl's job responsibilities, however, were performed not by Hochstrasser, but were split between two existing SRA employees who had already been performing management work.

Nordahl filed suit on October 28, 1992. His Title VII claim was based on alleged national origin discrimination, specifically, on allegations that Studer Revox discriminated against all non-Swiss employees. He claimed his employment contract provided for just-cause discharge only, and that, moreover, his termination violated an implied covenant of good faith and fair dealing. His retaliatory discharge claim was primarily premised on an allegedly illegal land transaction of which he claimed to have complained to two Studer Revox principals. His fraudulent inducement claim was based on alleged misrepresentations by Hochstrasser at the time they entered into Nordahl's employment contract to the effect that Studer Revox's digital audio capabilities were greater than they actually were.

The defendants moved for summary judgment as to all of Nordahl's claims. The district court concluded that, under Tennessee law, Nordahl's contract was at-will, and that his theory of breach of an implied covenant of good faith was not available, because such a doctrine would conflict with Tennessee's strong policy of employment-at-will. The district court rejected Nordahl's Title VII claim on the ground that he failed to prove a *prima facie* case.

The court rejected Nordahl's retaliatory discharge claim both on the merits, nothing Nordahl's admission that no one ever asked him to engage in or remain silent about any illegal activity, and, alternatively, on statute of limitations grounds. Finally, the district court found that Nordahl's fraud claim was barred by the applicable statute of limitations. Nordahl filed a timely appeal.

II.

This court's review of a district court's grant of summary judgment is *de novo. See Talley v. Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241, 1245 (6th Cir. 1995). In reviewing summary judgment motions, courts must view the evidence in the light most favorable to the nonmoving party, and determine whether all the evidence before the district court " 'show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to [a] judgment as a matter of law.' " *Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc.*, 862 F.2d 597, 601 (6th Cir. 1988) (quoting Fed.R.Civ. P. 56(c)); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "Material facts are only those facts that might affect the outcome of the action under governing law." *Talley*, 61 F.3d at 1245 (citations omitted).

Subject matter jurisdiction in this case arises out of diversity of citizenship, 28 U.S.C. § 1332, and we therefore apply Tennessee law, including its choice-of-law provisions. *Davis v. Sears, Roebuck & Co.*, 873 F.2d 888, 892 (6th Cir. 1989); *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This court reviews *de novo* the district court's determination of what Tennessee's substantive law is. *J.G.*

Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co., 936 F.2d 1474, 1483 (6th Cir. 1991).

III.

A.

Nordahl's Title VII claim alleges that SRAG's Swiss management discriminated against non-Swiss employees by choosing to terminate them rather than Swiss employees during a time of financial distress. In support, Nordahl points to various instances of what he asserts was general favoritism toward Swiss and animosity towards non-Swiss, as well as to incidents of what he contends constitute circumstantial evidence of discriminatory animus toward Nordahl due to his non-Swiss status.

In Title VII actions, the plaintiff bears the initial burden establishing a *prima facie* showing that the defendant discriminated. *Talley*, 61 F.3d at 1246. To do so, he may employ either of two methods: presenting direct evidence of intentional discrimination, or showing the existence of circumstantial evidence that creates an inference of discrimination. *Id.* Here, the plaintiff has not presented, and does not suggest that he has presented, any direct evidence of intentional discrimination. Thus, he must proceed under the second method.

Under the second method, a plaintiff must show that (1) he is a member of a protected group; (2) he was subject to an adverse employment decision; (3) he was qualified for the position; and (4) he was replaced by a person outside of the protected class. *Id.* "The fourth element may also be satisfied by showing that similarly

situated non-protected employees were treated more favorably." *Id.*

Despite expressing some well-founded skepticism as to whether the 5 billion people in the world who are not Swiss can be deemed a protected class, the defendants largely confine themselves to challenging the plaintiff's proof with regard to the fourth prong of his *prima facie* case. Proof of this fourth element is crucial, and Nordahl must be able to show *either* that he was replaced by someone outside the protected class, *or* that similarly situated individuals not in the protected class were treated more favorably, *Id.* at 1247 (citation omitted).

Nordahl argues that replacement is a finding of fact, not properly made at the summary judgment stage. Under the circumstances of this case, however, his assertion is incorrect. It is undisputed that, following his termination, Nordahl's duties were simply redistributed to two existing employees directly below him in the management hierarchy who had already been performing related management work. It is well-established that "[s]preading the former duties of a terminated employee among the remaining employees does not constitute replacement." *Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir.), *cert. denied*, 506 U.S. 940 (1992); *Barnes v. GenCorp. Inc.*, 896 F.2d 1457 (6th Cir.), *cert. denied*, 498 U.S. 878 (1990). Therefore, as a matter of law, Nordahl was not replaced.

Nordahl also cannot satisfy the alternative test, as there were no employees similarly situated to him. "[T]he necessary inference of discrimination cannot be established absent proof that other employees were similarly

situated when that alternative is the only remaining avenue by which plaintiff could establish his prima facie case." *Talley*, 61 F.3d at 1247. In order to be similarly situated, it is clear that individuals must be "comparable [ ] . . . *in all respects*." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992). Nordahl cannot show that he was treated differently from a similarly situated employee, because no employees were similarly situated with regard to pay or job duties.

B.

1.

In order to determine the merits of Nordahl's breach of contract and breach of implied covenant claims, we must first ascertain what law applies. Nordahl asserts emphatically that either Swiss or California law controls, not the "harsh" and "eccentric" law of Tennessee, but he does not favor us with any hint of what the Swiss or California law might be. *See In re Grand Jury Proceedings*, 40 F.2d 959 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 2558 (1995). As it develops, that omission is of no consequence, because Tennessee law controls.

The Tennessee Supreme Court's most recent pronouncement with regard to choice of law in a contract dispute is found in *Ohio Casualty Insurance Company v. The Travelers Indemnity Company*, 493 S.W.2d 465 (Tenn. 1973). Although stating that "[i]t is a familiar rule in Tennessee that the construction and validity of a contract are governed by the law of the place where the contract is made," *id.* at 466, thus suggesting that Swiss law should

apply here, the *Ohio Casualty* court went on to quote the following language with approval:

> "The Tennessee conflict of laws rule provides that rights and obligations under a contract are governed by the law of that state with the view to which it is made and that the intentions of the parties in this respect to be gathered from the terms of the instruments and all of the attending circumstances control. *Bowman v. Price*, 143 Tenn. 366, 226 S.W. 210 [(1920)]; *Deaton v. Vise*, 186 Tenn. 364, 210 S.W.2d 665, 668 [(1948)]. The Supreme Court of Tennessee, in the latter case said:
>
> > ' " * * * a contract is presumed to be made with reference to the law of the place where it was entered into unless it appears it was entered into in good faith with reference to the law of some other state." '

Id. at 466-67 (quoting *First American Nat'l Bank of Nashville v. Automobile Ins. Co.*, 252 F.2d 62 (6th Cir. 1958)). In other words, as noted by another Tennessee court, Tennessee generally applies the *lex loci contractus* rule, but "in certain situations, the law of the place of performance will be applied instead of the traditional rule." *Solomon v. Flo-Warr Management, Inc.*, 777 S.W.2d 701, 705 N.5 (Tenn. Ct. App. 1989). The pertinent consideration is whether a contract was "entered into in good faith with reference to the law of some other state," that is, whether it was made "with a view" to another state. *Ohio Casualty*, 493 S.W.2d at 466-67.

We conclude that the Supreme Court of Tennessee would apply the law of Tennessee to interpret the employment contract in question, as the circumstances

demonstrate that the contract was entered into with reference solely to Tennessee. There is absolutely no reason why the parties would have intended Swiss law to apply. As Nordahl himself acknowledges, it was a fluke that the contract was executed there, as the parties intended to sign the contract in California. Likewise, California law cannot reasonably apply, as there is an utter absence of connection to that state the contract was neither executed nor performed there. Instead, it seems quite clear that Tennessee, where the contract was to be wholly performed, was the state with reference to which the contract was entered. Tennessee law, accordingly, controls.

2.

Nordahl contends that the language in his contract referring to the parties' intention to form a "long[ ] term" relationship, the fact that the contract stated an annual salary, and Hochstrasser's oral representations that Nordahl would be terminated only for cause, all demonstrate that he was not an at-will employee. Nordahl also points to minutiae in his contract which he contends are provisions that were breached by SRA separate and apart from the termination; however, he fails to point to any evidence in the record that would support the existence of the claimed breaches.

Tennessee is an employment-at-will jurisdiction where, as a general matter, an employer may fire an employee for good cause, for no cause, or even for a cause that is morally wrong. *See Whittaker v. Care-More, Inc.*, 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981). In Tennessee, a contract for permanent employment is considered

an indefinite hiring terminable at the will of either party. *Id.* Tennessee courts have interpreted contracts for the "long term" as being contracts for permanent employment, and thus at-will contracts. *D'Andrea v. Plough Sales Corp.*, 107 Lab. Cas. (CCH) P55,834 (Tenn. Ct. App. 1987). Nonetheless, Tennessee courts have construed contracts containing salaries based on an annual amount to constitute a hiring for a one-year period. *See Delzell v. Pope*, 294 S.W.2d 690 (Tenn. 1956); *Ward v. Berry & Associates, Inc.*, 614 S.W.2d 372 (Tenn. Ct. App. 1981). However, "the time of payment is not conclusive that the parties have agreed the employment is to continue for the pay period but it is to be considered along with other relevant facts." *D'Andrea, supra.* Tennessee law is clear that oral representations allegedly made prior to the preparation and execution of the employment contract can have no effect, as any such representations are "merged into the final written contract, which is deemed to represent the whole of the parties' understanding. *Turner v. Zager*, 363 S.W.2d 512, 517 (Tenn. App. 1962).

It is evident that, under Tennessee law, Nordahl's contract claim must fail. The language of his contract is, at best, that of "permanent" employment. A contract for permanent employment is deemed to be a contract of indefinite duration. A contract of indefinite duration is deemed to be one terminable at the will of either party. Indeed, there can be no question that a contract providing that either party may terminate the contract when he or it "wishes" is an at-will contract. Moreover, the alleged representations of Hochstrasser are of no avail, since they occurred before the execution of the contract. As such,

they are "merged" into the written contract, so that its terms supersede.

3.

Nordahl argues, as an alternative to his breach of contract claim, that Tennessee law implies a duty of good faith and fair dealing in every contract, and that because SRA terminated him either for discriminatory or retaliatory reasons, it must surely have breached that duty. Tennessee law does not, however, recognize a claim for breach of an implied covenant of good faith and fair dealing in the employment context. *Whittaker*, 621 S.W.2d at 396-97; *see Shelby v. Delta Air Lines, Inc.*, 842 F.Supp. 999, 1014 (M.D. Tenn. 1993), *aff'd mem.*, 19 F.3d 1434 (6th Cir. 1994). Even if Tennessee were to recognize a claim of that nature, however, Nordahl's claim must fail because it relies on either his discrimination or his retaliation claim for validity. As we have already held, his Title VII claim is without merit, and as we shall explain below, so is his retaliation claim. Given that his good-faith claim lives or dies with those two claims, it must, necessarily, die.

C.

Nordahl asserts that he "protested four unlawful acts" by Studer Revox during his employment; that his protests soured his relationship with management; and that accordingly, he had stated a claim for violation of Tennessee's retaliatory discharge statute. He also disputes the district court's conclusion that his claim was time-barred, describing it simply as a "doubtful proposition" that a one-year statute applies, and suggesting that

the statute should start running at the date he received his last paycheck, which was six months after his actual termination.

On March 29, 1990, the Tennessee legislature enacted a statute prohibiting employers from firing employees who refuse to engage in, or remain silent about, the employer's illegal activities. TENN. CODE ANN § 50-1-304. It is well-settled in Tennessee that the one-year statute of limitations prescribed by TENN. CODE ANN. § 28-3-104, governing damages to the person, applies to retaliatory discharge claims. *See Bennett v. Steiner-Liff Iron & Metal*, 826 S.W.3d 119, 121 (Tenn. 1992); *Headrick v. Union Carbide Corp.*, 825 S.W.2d 424, 426 (Tenn. Ct. App. 1991); *Brooks v. Philips Consumer Electronics Co.*, No. 03A01-9501-CV-00035, 1995 WL 416955 at *4 (Tenn. Ct. App. July 14, 1995). It is likewise well-established that an employee's cause of action accrues at the time he learns of his termination, not at the time he receives his last paycheck. *Webster v. Tennessee Board of Regents*, 902 S.W.2d 412, 414 (Tenn. Ct. App. 1995) (citing *Delaware State College v. Ricks*, 339 U.S. 250, 258 (1980)); *Weber v. Moses*, No. 02A01-9407-CH-00173, 1996 WL 16650, at *3 (Tenn. Ct. App. Jan. 17, 1996).

Thus, it is plain that Nordahl's retaliatory discharge claim is barred by the statute of limitations. The time for filing began to run on October 11, 1991, when he received written notice of his termination, rather than six months later, when he received his last check, and it had expired by the time he filed suit on October 28, 1992.

D.

Finally, Nordahl's fraudulent inducement claim is also time-barred. His fraud allegations depend on the fact that Hochstrasser told him that certain products would be available at certain times, but they were not, and on the testimony of a Swiss manager, who told him in 1991 that Hochstrasser deliberately misrepresented product delivery schedules "to protect his own position." Nordahl puts these two pieces of information together to conclude that "he had been deliberately lied to in order to induce him to join Studer Revox."

The statute of limitations applicable to a case of fraudulent inducement in Tennessee provides that such actions "shall be commenced within three (3) years from the accruing of the cause of action." TENN. CODE ANN. § 28-3-105; *see Prescott v. Adams*, 627 S.W.2d 134, 137 (Tenn. Ct. App. 1981). The statutory phrase "from the accruing of the cause of action" has been construed to mean "from the time when the plaintiff knew or reasonably should have known that a cause of action existed." *Stone v. Hinds*, 541 S.W.2d 598, 599 (Tenn. Ct. App. 1976); *see Prescott*, 627 S.W.2d at 138. Thus, the plaintiff's "cause of action accrues at the time the injury occurs, or when it is discovered, or when in the exercise of reasonable care and diligence the injury should have been discovered." *Prescott*, 627 S.W.2d at 138. To benefit from the discovery rule in the fraud context, "the plaintiff must prove that the defendant took affirmative action to conceal his cause of action and that he, the plaintiff, could not have discovered his cause of action despite exercising reasonable diligence." *Vance v. Schulder*, 547 S.W.2d 927, 930 (Tenn. 1977).

Nordahl's suit was filed on October 28, 1992; thus, any claims of which he knew or which he should reasonably have discovered by or before October 28, 1989, are barred. As the defendants point out, as a self-described experienced senior executive in the industry, it is inconceivable that, after heading the company for more than a year, Nordahl would have remained ignorant of the company's finances, products, and customer relations record. Indeed, the defendants point to a wealth of evidence that demonstrates Nordahl's knowledge, three years before filing suit, of matters he now says were concealed from him. Even if he was, in fact, ignorant of the matters of which he complains, it is wholly inconceivable that he could not have uncovered the alleged fraud regarding the development schedule of one of SRA's major products if he had exerted even minimal effort. Indeed, he does not suggest that he exerted any effort to uncover the fraud. Under these circumstances his claim is barred.

IV.

WE AFFIRM.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TORE B. NORDAHL, Plaintiff, v. STUDER REVOX AMERICAN, INC., STUDER CAPITAL CORPORATION, STUDER EDITECH CORPORATION, STUDER REVOX AG, Defendants.	)	No. 3:92-0959 JUDGE WISEMAN

MEMORANDUM

(Filed Sept. 22, 1994)

The plaintiff, Mr. Tore B. Nordahl, brought this action alleging breach of contract, national origin discrimination, retaliatory discharge, fraud, and civil conspiracy. Nordahl claims that the defendants wrongfully terminated his employment contract. The defendants have filed a motion for summary judgment. Extensive discovery has taken place, briefs have been filed with citations to the record, and the court heard oral arguments on the action. For the reasons hereinafter set out, the motion is granted on all counts.

Facts

Studer Revox American, Inc. ("SRA") was a Delaware corporation that had its principal place of business in Nashville from 1975 to 1993. SRA imported, sold, and

serviced professional sound recording equipment and other highgrade audio products. SRA was a wholly-owned subsidiary of Studer Revox AG ("SRAG"), a Swiss corporation based in Regensdorf, Switzerland. Studer Capital Corporation ("SCC") is a Tennessee corporation wholly-owned by SRAG that provided long term equipment financing to some SRA customers. SCC owns all the stock of Studer Editech Corporation ("SEC"), a California corporation that develops and makes disc-based sound recording and editing equipment.

On October 7, 1988, SRA hired Nordahl, a Norwegian national who has lived in the U.S. since the late 1960's. Nordahl and SRA signed an employment contract that made Nordahl SRA's Vice President and General Manager. Pursuant to the contract, Nordahl became SRA's president on April 1, 1989. The employment contract was for a one year term with automatic renewals for additional one year terms unless 180 days written notice of termination was given prior to the start of a contract year. Yearly addenda to the contract increased Nordahl's salary and commission arrangement. Nordahl also served as chairman of SEC's board of directors until April 14, 1991. SRA subsequently ceased to exist in August 1993, apparently due to progressively swelling losses.

On October 11, 1991, SRA gave Nordahl written notice that it was terminating the employment contract. Nordahl filed a complaint with EEOC against SRA. He then sued SRA, SRAG, SCC, and SEC claiming "fraudulent misrepresentation, breach of contract, wrongful termination, retaliatory discharge, failure to pay as promised, and discrimination in employment practices by

the Defendants." Each of these grounds is without merit as will be discussed herein.

Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476-1480 (6th Cir. 1989). The party seeking summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In responding to a motion for summary judgment, the nonmoving party cannot rest on its pleadings, but must present some "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The Supreme Court concluded in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), that a dispute about a material fact is "genuine" within the meaning of Fed. R. Civ. P. 56 only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." 477 U.S. at 248. "The mere existence of a scintilla of evidence in support of the [nonmoving party's] position will be insufficient." 477 U.S. at 242. Of course, the court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the nonmoving party. 477 U.S. at 255.

Breach of the Employment Contract

The plaintiff maintains that California law must be applied to the contract disputes in this case because the contract was negotiated with Nordahl while he was a

California resident and because two executives of Studer Revox agreed that Nordahl would sign the contract in California. The contract, however, actually was executed in Switzerland. If the laws of the various states are conflicting in a diversity case such as this one, then the forum state's choice of law rules are applied to determine which state's substantive law the court should use. *Klaxen Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 494-96 (1941). Nordahl fails to mention whether or how California, Tennessee, and Swiss law differ with respect to the issues in dispute. Assuming that the laws of these states are different, this Court must apply Tennessee's choice of law rules to determine whether California, Tennessee, or Swiss laws will be applied to disputes about this employment contract. The plaintiff relies on *Soloman v. FloWarr Management, Inc.*, 777 S.W.2d 701 (Tenn. Ct. App. 1989), to support his choice of law proposition. The *Soloman* case, however, involved a dispute about whose law applied to a negotiated and signed release that relieved the employer of obligations under an employment contract. *Id.* at 704. That court specifically stated that it was considering the validity of the release and not the validity of the contract. *Id.* Without further support, it would be inappropriate to stretch this case to apply to employment contracts. *Edginton v. Edginton* is the more appropriate case here. 162 S.W.2d 1082 (Tenn. 1942). In that case, the Tennessee Supreme Court stated that when a contract is made in one place and is agreed to be performed in another place, then the law of the place of performance will govern the contract. *Id.* at 1086. In the case at hand, the contract was executed in Switzerland and performed

in Tennessee, and thus Tennessee law applies to the contract disputes.

Nordahl claims that SRA breached the employment contract by terminating him without good cause for two reasons. He first argues that the contract was not terminable at will because that would be inconsistent with the express language of the contract stating that the relationship was meant to be long term.[1] The defendants assert that they terminated Nordahl's employment contract according to the terms of the contract which allowed either party to end the relationship at any time with proper notice for any reason. The express language of the contract provided that either party could terminate the contract with 180 days written notice "in the event one of the parties *wishes* to terminate the employment relationship" (emphasis added). In *Hance v. United Family Life Ins. Co.*, the court held that a written employment contract providing that either party could terminate the contract by written notice created an employment-at-will relationship. 725 S.W.2d 680, 681 (Tenn. Ct. App. 1986). The contract also states, however, that the "employment relationship is intended to be for the longer term." The

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[1] Section 9 of the contract states as follows:

> Both parties agree that this employment relationship is intended to be for the longer term. However, in the event one of the parties wishes to terminate the employment relationship, the following terms apply:

The agreement can be cancelled by notice in writing by either party with:

- 90 days notice prior to March 31, 1989.
- 180 days notice thereafter.

Tennessee courts have held that even a contract for permanent employment is an at-will contract if it is for an indefinite term. *Graves v. Anchor Wire Corp.*, 692 S.W.2d 420, 422 (Tenn. Ct. App. 1985); *Combs v. Standard Oil of Louisiana*, 59 S.W.2d 525, 526-27 (Tenn. 1933). This particular contract was automatically renewable in yearly terms. Although the record indicates that Nordahl was hired permanently rather than temporarily, his term of employment was not definite and therefore was at-will. Nordahl also admitted in his deposition that he could have quit at any time with proper notice and without good cause. An employment contract that is terminable at the will of the employee is terminable at the will of the employer also. *Savage v. Spur Distributing Co.*, 228 S.W.2d 122, 124 (Tenn. Ct. App. 1949); *Klein v. May*, 1986 WL 12177, *4 (Tenn. Ct. App., October 31, 1986) (holding that a contract was at-will when the employee admitted he was free to quit). Finally, Nordahl admits he drafted the final version of his own employment contract to include "exactly what we had agreed the written contract to be." Thus, the employment relationship clearly was at-will.

Second, Nordahl claims that the employment contract could be terminated only with good cause because Bruno Hochstrasser, a Swiss national who has worked for Studer Revox since 1971 and who was the chairman of the board of SRA while Nordahl was president, and Eugen Spoerri, an executive at SRAG, verbally told Nordahl that he would not be terminated except for good cause. The Tennessee Supreme Court, however, has held that an employee-at-will can be terminated "for good cause, for bad cause, or no cause at all, without being thereby guilty of legal wrong." *Harney v. Meadowbrook Nursing Center,*

784 S.W.2d 921, 922 (Tenn. 1990). Even if this Court were to find that good cause were required, the defendants have presented evidence that indicates that they probably did have good cause for terminating Nordahl. They hired a consulting firm in 1991 that made recommendations for improving SRA's poor performance which included changing the management at SRA. Julian Mack of the consulting firm also told Hochstrasser that Nordahl intimidated potential customers and hurt the company's reputation. Furthermore, when SRA's board made a business decision in October of 1991 to terminate Nordahl's contract, SRA gave Nordahl 180 days notice of his termination, in accordance with the contract, and paid Nordahl his full salary and benefits for those six months. The evidence clearly indicates that SRA did not breach the contract when it terminated the at-will relationship in accordance with the terms of the contract.

Breach of Duty of Good Faith and Fair Dealing

Nordahl claims that the defendants breached the contract's implied covenant of good faith and fair dealing in a number of ways. The plaintiff argues that whether or not the contract was terminable-at-will, Tennessee law requires the parties to act in good faith and to deal with each other fairly. *Hooks v. Gibson,* 842 S.W.2d 625 (Tenn. Ct. App. 1992) (holding that the rule that all parties to a contract are held to the duty of good faith and fair dealing is applicable to employment contracts). Nordahl claims that the defendants breached this implied covenant when they terminated him. In *Hooks* the court held that the implied covenant required the employer to follow the established procedures for the termination of the

employees. *Id.* As discussed above, SRA complied with the contract when it gave Nordahl 180 days notice of his termination and paid him his full salary during that time. Next, Nordahl claims that the defendants breached the implied covenant by discriminating against him on the basis of national origin, by discharging him wrongfully, and through fraudulent inducement. These claims are addressed individually below. Finally, Nordahl asserts that SRA dishonorably attempted to blame him for its anticipated loss, thereby breaching the implied covenant because Studer Revox knew the anticipated loss was entirely due to the products, pricing, and management problems at SRAG. There is no indication in the record that SRA dishonorably blamed Nordahl for that loss.

The defendants claim that there was no implied covenant of good faith and fair dealing with respect to the termination of employment in this case. Although there are exceptions to the employment-at-will doctrine, such as retaliatory discharge, the Tennessee courts have declined to adopt the theory that there is an implied covenant of good faith and fair dealing in any contract of employment such that a termination not in good faith constitutes a breach of contract. *Whittaker v. Core More, Inc.*, 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981). Additionally, the District Court held in *Shelby v. Delta Airlines, Inc.* that employment-at-will contracts are not encumbered with an implied duty of good faith and fair dealing. 842 F.Supp. 999, 1014 (M.D.Tenn. 1993), *aff'd* 19 F.3d 1434 (6th Cir. 1994). In fact, to allow such an implied covenant would gut the employment-at-will rule. *Whittaker*, 621 S.W.2d at 397. Thus, there is no implied covenant of good faith and fair dealing with respect to the termination of

an employee-at-will, and Nordahl's employee-at-will status resolves his implied contract claims as a matter of law.

Title VII – National Origin Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). The complaining party must establish an unlawful employment practice by demonstrating that race, color, religion, sex, or national origin was *one* motivating factor for the employment practice. 42 U.S.C. § 2000e-2(m).

Nordahl claims that SRA and SRAG willfully and recklessly discriminated against him by wrongfully dismissing him on the basis of his national origin in violation of Title VII. Nordahl alleges that SRA discriminated against him because he was not a Swiss national. He filed a formal complaint with the EEOC on February 5, 1992 alleging age and national origin discrimination and states that the EEOC issued a right to sue letter to him on September 10, 1992.

To survive the motion for summary judgment, Nordahl claims he need only establish a prima facie case and offer evidence establishing material issues in dispute with respect to SRA's stated reasons for termination. He claims he has established a prima facie case by showing that he was "imminently qualified," that he was not a Swiss national, that he was replaced by Swiss nationals, and that SRA terminated only non-Swiss employees from 1980 to 1992. He claims that the following additional evidence also establishes a prima facie case: two Swiss

nationals received fringe benefits not available to non-Swiss employees; one Swiss national received other preferential treatment when he had his own pipeline to the Swiss management that circumvented and often undermined U.S. management; and two executives' wives were employed by SRA – allegedly for the purpose of visiting family in Canada and to keep illegal employment records away from the American accounting staff.

Nordahl also presents anecdotal, circumstantial, and statistical evidence to support his Title VII claim. He lists several pieces of "anecdotal evidence of national origin bias." He mentions a comment made by Muggler, a Swiss national and the executive vice president of SRA from 1982 to 1993, that Muggler could not support Nordahl against the Swiss management because Muggler was Swiss himself. He further claims that one Swiss national told another executive that he trusted Muggler because he was Swiss. These two comments hardly are probative of SRA's reason for the termination in light of the other evidence presented. Next, Nordahl recalls a remark made by Bruno Raschle, an [sic] SRAG executive, at a June 1990 dinner: "Raschle told me that Swiss companies in general and Motor-Columbus[2] specifically do not allow non-Swiss to participate in material corporate decisions and that I would never become a member of any SRAG inner circle." Nordahl considers this comment to be "direct evidence of bias against non-Swiss at the highest level of

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[2] Defendant SRAG is wholly owned by SAEG Refindus Holding AG ("SAEG"), a Swiss corporation. Motor-Columbus AG, also a Swiss corporation, owns approximately 50% of SAEG.

Studor Revox." The defendants, however, argue that the comment made at this dinner meeting is irrelevant. First, Nordahl was the president of SRA, not a member of the board or a director of SRAG, and he had no reason to expect to be a member of the SRAG inner circle. Furthermore, Raschle was not a director or officer of SRA and his comments probably had no bearing on the reason SRA terminated Nordahl's employment contract 16 months later. See *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025-26 (6th Cir.), *cert. denied*, 114 S.Ct. 175 (1993) (holding that age-related statement by a supervisor to the plaintiff nearly one year before her layoff were made too long before the layoff to have influenced the decision to terminate). Likewise, this comment was made long before the termination and by someone not directly responsible for the decision.

Next, Nordahl discusses circumstantial evidence of discrimination: that SRA has a history of terminating non-Swiss senior managers and retaining Swiss nationals, especially in times of serious financial difficulty. He supports his "circumstancial evidence" with statistics. The plaintiff uses the following facts to establish a statistical disparity: none of the total of ten Swiss employees who worked for SRA from 1980 through 1992 was fired; between July 1, 1990 and December 31, 1992, SRA fired four non-Swiss management employees, including Nordahl, and retained only two Swiss managers; during this same period, the entire work force decreased from 44 to 17 through voluntary and involuntary termination and

the number of Swiss employees increased from three to four.[3]

The statistical figures themselves are not disputed. Rather the dispute is whether the statistics are probative at all because they are based on such a small sample size. SRA asserts that Nordahl cannot be compared statistically to its other employees for two reasons. First, although SRA did not fire any Swiss nationals when it reduced its work force from 45 to 27 from 1990 through 1992, SRA never had more than five Swiss employees at one time. They stress that the obvious reason for the disparity between Swiss and non-Swiss employees during the work force reduction was the dearth of Swiss employees. The defendants first cite *Khan v. Grotnes Metalforming Systems, Inc.*, 679 F.Supp. 751 (N.D.Ill. 1988), in which Grotnes fired 18 non-Swiss employees during a work force reduction and the plaintiffs there claimed that Grotnes violated Title VII by favoring Swiss employees. The court in that case granted summary judgment and stated that the fact that Grotnes did not fire any Swiss employees during the work force reduction did not indicate a discriminatory motive because the defendant only employed five Swiss employees in the departments where the reductions were made and because such statistical imbalance was not probative with a sample size that was too small to be statistically significant. Id. at 762. Unlike the employees in *Khan*, Nordahl cannot be compared with other employees at SRA because he was a chief executive officer whereas the employees in *Khan* were not executive officers and could easily compare themselves to other

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[3] Alex Ruegg, an engineer, was hired in February 1991.

similarly situated employees. Furthermore, the statistics in the case at hand are not probative because the sample size is too small to be statistically significant. See also *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 943 n.7 (6th Cir. 1987) (stating that "[a] number of courts have recognized that small statistical samples provide little or no probative force to show discrimination").

The plaintiff disputes SRA's reasons for his discharge and believes he was merely a scapegoat. First, in the notice of termination, Hochstrasser listed, as the reason for Nordahl's discharge, SRA's poor performance – the anticipated loss for 1990 and 1991 in excess of one million dollars. Nordahl believes that the losses were blamed on him but actually were due to SRAG's management which refused to adopt his recommendations to help reduce his predictions of such losses. Additionally, the term "performance" as used in the termination letter could just as easily refer to the general performance of SRA as to Nordahl's performance as an individual. Second, Nordahl also rejects Hochstrasser's assertion that the termination was due, in part, to the management consultant's recommendation to change the management at SRA and their reports that Nordahl was intimidating customers and hurting the company's reputation. Nordahl believes this is pretextual because the consultant's report was issued six weeks after he was terminated, and he claims that the consultants had insufficient knowledge and had performed only a limited investigation prior to his termination. Furthermore, Nordahl says that Julian Mack at the consulting firm made comments to Nordahl that directly contradicted Hochstrasser's version of what Mack had told him. Third, Hochstrasser identified Nordahl's high

salary as another reason for his termination. Nordahl claims this is unsupportable and obviously pretextual because the new management received large wage increases. Following Nordahl's termination, three managers assumed the various duties of the plaintiff and were given raises. The sum of the increases in their salaries, however, was significantly lower than Nordahl's salary. Nordahl also claims that these managers were not as qualified as he, but he does not assess their skills with regard to their new individually assigned duties.

Throughout his lengthy presentation of evidence, the plaintiff ultimately failed to prove a prima facie case by showing a discriminatory motive behind his termination. Nordahl lacks evidence sufficient for a reasonable jury to find that the defendants intentionally discriminated against him. A plaintiff claiming national origin discrimination must show as part of a prima facie case that the employer sought to replace the plaintiff with someone outside the protected class. *Hong v. Children's Memorial Hospital*, 993 F.2d 1257, 1261 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1372 (1994). Spreading the former duties of a terminated employee among the remaining employees does not constitute replacement. *Lilley v. BTM Corp.*, 958 F.2d 746, 752 (6th Cir.), *cert. denied*, 113 S.Ct. 376 (1992) (age discrimination case). In fact, there is an inference against discrimination: the same person who hired Nordahl also fired him. This kind of situation creates an inference against a discriminatory motive. *See Pound v. Stone*, 945 F.2d 796, 797-98 (4th Cir. 1991) (age discrimination case). Thus Nordahl has failed to prove that a discriminatory motive was the real reason for the discharge and has not produced sufficient evidence of national

origin discrimination to justify a trial of his Title VII claim.

Retaliatory Discharge

Section 50-1-304 of the Tennessee Code Annotated on retaliatory discharge states that "No employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activity." In his complaint, the plaintiff states that he brings this action to redress retaliatory discharge, but he failed to state a claim upon which relief could be granted as required by Rule 12(b) of the Federal Rules of Civil Procedure.

In response to the motion for summary judgment however, the plaintiff discusses, in great detail, each of four allegedly illegal activities: an insider land transaction; an income tax evasion scheme; a tax evasion by direct payment; and violation of U.S. immigration laws. The defendants disagree with Nordahl's assertion that the land deal was illegal. In April of 1990, SRA purchased land from a partnership that included as partners, two Studer Revox executives. Nordahl claimed that SRA was paying the partnership too much for the property and that he "unsuccessfully opposed the land transaction due to the grossly unfair price." The defendants have shown that a comprehensive appraisal indicates that the price probably was not unfair. Additionally, they assert that if the sale was a conflict of interest transaction under Tenn. Code Ann. § 48-18-302, it was voidable by the corporation but was not illegal. With regard to the other allegedly illegal activities, the defendants state that Nordahl has

not proved any details of the activities or identified any law or regulation that SRA violated while Nordahl was president. Furthermore, Nordahl admits that no one ever asked him to engage in any illegal activity. He does not recall anyone asking him to remain silent about any perceived illegal activity. He never reported an illegal act to any outside authority before or after he left SRA. He has failed to prove that his whistleblowing was the sole reason for his termination as required by the statute. Finally, although his relationship with Hochstrasser and Muggler deteriorated after he complained about the land sale, that occurred 18 months prior to Nordahl's receiving his termination notice. Mere disagreements over business decisions do not create a retaliatory discharge claim. Thus, this allegation should be dismissed for failure to state a claim and because the record shows that Nordahl never had any basis for this claim.

Furthermore, this claim is time barred: there is a one year statute of limitations on retaliatory discharge actions. Tenn. Code Ann. § 28-3-104(a). Nordahl was fired on October 11, 1991 and filed this suit more than one year later on October 28, 1992.

Fraud

Nordahl claims that the defendants fraudulently induced him to join SRA as an executive and to keep him motivated once he was working there by willfully, recklessly, and grossly misrepresenting 1) the state of their technological progress and capabilities; 2) the state of their financial strength and profitability; 3) the delivery schedule for important products; 4) their commitment to

the U.S. market requirements; and 5) their customer relations record.

A plaintiff must bring the fraud claim within three years of when he knew or reasonably should have known that the claim existed. *Vance v. Schuler,* 547 S.W.2d 927, 931-32 (Tenn. 1977); *Stone v. Hinds,* 541 S.W.2d 598, 599 (Tenn. Ct. App. 1976). The question is whether he knew or should have known that the claim existed before October 27, 1989, three years prior to the filing of the lawsuit.

Nordahl believes his claim is not time barred. He cites *Long v. State Farm Fire & Casualty Co.,* 510 S.W.2d 517, 519 (Tenn. Ct. App. 1974), in which the court stated that summary judgment is inappropriate when an action is based on a complex scheme of fraud. Nordahl claims that this is such a case. He asserts that Studor Revox misrepresented its digital audio capability to him when he was hired and for nearly three years thereafter. He states that he was mislead about the trouble Studor Revox was in when he was hired and that SRAG repeatedly misrepresented and concealed the fact that Studor Revox's digital equipment was below industry standards. Nordahl further asserts that he did not and could not reasonably have known about these problems until he was told about them in April 1991. He explains that although he was the president of SRA, the fraud was committed by the parent company SRAG and its executives, the fraud concerned the finances and product conditions at SRAG in Switzerland, and SRAG shared limited management information with him.

The defendants argue that Nordahl's fraud in the inducement claim is time-barred. They argue that as a

matter of law Nordahl knew or should have known long before October 27, 1989 of the alleged misrepresentations for several reasons. By that time, Nordahl had been an executive officer of SRA for more than one year and had been president of SRA for more than six months. Nordahl considers himself an experienced senior executive within the professional audio industry and states that his experience in the industry spans 18 years. A diligent chief executive officer presumably is familiar with his company's finances and products. Nordahl had known by March 1989 that certain important products were not up to U.S. specifications and were seriously late. In fact, he was given a $6000 bonus in June 1989 expressly because of lost sales commissions due to delays in delivery. Thus, Nordahl's fraud claim clearly expired at least four months before he filed this suit.

Civil Conspiracy

The civil conspiracy claim was abandoned on the record by the plaintiff at oral argument.

Accordingly, summary judgment is hereby granted for all counts and an appropriate order will enter.

/s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
United States District Judge

Case No: 94-6336

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

(Filed Mar. 26, 1996)

TORE B. NORDAHL

Plaintiff - Appellant

v.

STUDER REVOX AMERICA, INC., a foreign corporation; STUDER CAPITAL CORPORATION, a Tennessee corporation; STUDER EDITECH CORPORATION, a foreign corporation; STUDER REVOX AG, a foreign corporation

Defendants - Appellees

BEFORE: JUDGES MARTIN, GUY, AND RYAN

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED.**

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk